

E-002/CG-88-489 DENYING PETITION FOR RECONSIDERATION AND REHEARING,  
DEFERRING ISSUE OF CONSIDERATION BY ADMINISTRATIVE LAW JUDGE, AND  
ESTABLISHING TIMEFRAME FOR RESPONSIVE COMMENTS

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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Chair  
Commissioner  
Commissioner  
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In the Matter of the Joint Petition of Dakota County and Winona County for an Order Resolving Disputes Relating to Purchases by Northern States Power Company of Electric Power from the Operation of Solid Waste Recovery Facilities to be Located in Dakota and Winona Counties, Minnesota

ISSUE DATE: April 17, 1990

DOCKET NO. E-002/CG-88-489

ORDER DENYING PETITION FOR RECONSIDERATION AND REHEARING, DEFERRING ISSUE OF CONSIDERATION BY ADMINISTRATIVE LAW JUDGE, AND ESTABLISHING TIMEFRAME FOR RESPONSIVE COMMENTS

PROCEDURAL HISTORY

On July 18, 1988, Dakota and Winona Counties (the Counties) filed a joint petition requesting the Commission to resolve contractual disputes between themselves and Northern States Power Company (NSP or the Company). Both Counties were planning to construct and operate solid waste resource recovery facilities which would be designated as "qualifying facilities." The contractual disputes concerned differing formulas proposed by the parties for calculating NSP's avoided cost.

The matter was referred by the Commission to an Administrative Law Judge. After reviewing the Administrative Law Judge's Findings, the Commission issued its ORDER RESOLVING DISPUTES REGARDING TERMS OF CONTRACT BETWEEN UTILITY AND QUALIFYING FACILITIES on July 7, 1989. In that Order, the Commission made determinations on the parties' ten main areas of dispute, and also required the parties to submit initial comments on implementation of the statutory provisions for awarding costs, disbursements and attorneys' fees.

On January 26, 1990, the Commission issued its ORDER REQUIRING PAYMENT OF COSTS AND ATTORNEYS' FEES, in which costs and attorneys' fees were awarded to the Counties for success on two issues, the Equity Adjustment and Requirements to Conform to Future Amendments to MAPP Agreement.

On February 15, 1990, the Counties responded to the January 26 Order by filing a Petition for Reconsideration and Rehearing. In their petition the Counties urged the Commission to find that the Counties had prevailed, under the terms of the January 26 Order, on the transmission loss adjustment and the on-call requirement. The Counties requested a full recovery of costs and fees associated with these issues. In the petition the Counties also requested a partial recovery for two other issues, the escalation rate and the in-service date. The Counties reasoned that the Commission had not adopted NSP's position on these two issues, and thus the Counties should be allowed a partial recovery of costs and attorneys' fees. Finally, the Counties petitioned the Commission to send the issue of attorneys' fees and costs to an administrative law judge (ALJ) for determination.

NSP filed a reply to the Counties' petition on February 26, 1990. In its reply, NSP opposed full or partial recovery of costs and fees by the Counties for any of the four issues cited in the Counties's petition. NSP also argued that it is premature to assign an administrative law judge to the issue of attorneys' fees and costs, before the Commission has determined if there are material facts in dispute.

On the same day that NSP filed its reply, the Counties filed their Presentation Regarding Costs and Attorneys' Fees. On March 16, 1990, NSP filed a Request for Clarification of Order or Leave to Defer Responsive Comments.

The matter came before the Commission on March 29, 1990.

## FINDINGS AND CONCLUSIONS

### Minnesota Statute and Rule Governing Costs and Attorneys' Fees

Under Minnesota statute and rule, the Commission may include costs, disbursements and attorneys' fees in its Order resolving disputes between an electric utility and a qualifying facility.

Minn. Stat. §216B.164 **COGENERATION AND SMALL POWER PRODUCTION**  
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Subd. 5. Disputes. In the event of disputes between an electric utility and a qualifying facility, either party may request a determination of the issue by the Commission. In any such determination, the burden of proof shall be on the utility. The Commission in its order resolving each such dispute shall require payments to the prevailing party of the prevailing party's costs, disbursements, and reasonable attorneys' fees, except that the qualifying facility will be required to pay the costs, disbursements, and attorneys's fees of the utility only if the Commission finds that the claims of the qualifying facility in the dispute have been made in bad faith, or are a sham, or frivolous.

Minn. Rules, Part 7835.4550 **FEES AND COSTS**

In the order resolving the dispute, the Commission shall require the prevailing party's reasonable costs, disbursements, and attorneys' fees to be paid by the party against whom the issue or issues were adversely decided, except that a qualifying facility will be required to pay the costs, disbursements, and attorneys' fees of the utility only if the Commission finds that the claims of the qualifying facility have been made in bad faith or are a sham or frivolous.

### **Transmission Loss Adjustment**

When a cogenerator is closer to the contracting utility's load than the utility's usual power source is, the utility's transmission loss will be reduced, resulting in an avoided cost.

This avoided cost is known as the transmission loss adjustment.

NSP initially proposed a 1% transmission loss adjustment for Dakota County; the Counties proposed a 4.2% adjustment. After the administrative law judge heard evidence on the matter but before findings were issued, NSP in its post-trial brief agreed to the Counties's proposed 4.2% rate.

The statute and rule governing costs and attorneys' fees, cited above, both refer to the Commission's award of costs as part of the order determining a dispute between an electric utility and a qualifying facility. By logical inference, if no dispute is before the Commission, no award can be made. In the case of the transmission loss adjustment issue, the matter never was a dispute before the Commission. While the parties had once failed to agree on the issue, at no time was the dispute presented to the Commission for deliberation and determination. Since the matter was not before the Commission, the Commission will not award attorneys' fees or costs to either party.

### **On-Call Requirement**

The on-call requirement is a factor representing the yearly number of hours for which a qualifying facility contracts to provide full committed capacity on demand.

When originally before the Commission for dispute resolution, the Counties proposed a commitment of 200 on-call hours, with no damages. If this proposal had been accepted, the Counties would not have been required to reimburse NSP for any losses the Company sustained by reason of the Counties' failure to maintain the capability necessary to deliver the power promised. NSP proposed an obligation of 1500 on-call hours for the Counties, with damages potentially payable to the Company.

In its July 7, 1989 Order, the Commission decided the on-call requirement dispute by requiring the Counties to provide 750 on-call hours. The Commission also approved inclusion of the Company-proposed damages clause.

In its January 26, 1990 ORDER REQUIRING PAYMENT OF COSTS AND ATTORNEYS' FEES, the Commission did not award costs and attorneys' fees to the Counties for the on-call requirement issue. In the January 26 Order the Commission adopted the attorneys' fee formula found in Hensley v. Eckerhart, 461 U.S. 424 (1983). Citing Hensley, the Commission stated that "...a party may be considered as prevailing for attorneys' fee purposes if the party succeeded on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."

After carefully considering the arguments presented by both parties in the Counties' petition for reconsideration and NSP's reply, the Commission finds that the Counties did not succeed on the on-call requirement issue. The Counties' proposed number of hours was not adopted. The Commission instead approved the requirement of 750 hours proposed by the Department of Public Service (the Department). The Company's, not the Counties', position regarding damages was adopted. The Counties did not succeed on this issue, and the Commission will not award attorneys' fees to them.

### **Escalation Rate**

The escalation rate is the annual rate at which construction costs for the Company's future generating facilities can be expected to increase. The higher the escalation rate, the higher the projected costs of new facilities and the avoided costs payable to the Counties.

When originally before the Commission for dispute resolution, the Counties proposed a level escalation rate of 5.5% throughout the contract term. NSP proposed an escalation rate of 2% through 1996 and 4% thereafter. The Department proposed a 3% escalation rate through 1996 and 4% thereafter. The Commission agreed with the Department proposal and set the escalation rate accordingly.

In their petition for reconsideration, the Counties asked for partial recovery of costs and attorneys' fees because the Company's proposal had been "rejected and modified" by the Commission. The Counties argued that they should recover the portion of their costs which was commensurate with the degree of success they achieved on the issue.

In both this issue and the in-service issue (following), the Counties argued that the attorneys' fee statute places the burden of proof regarding attorneys' fees on the utility. Under this reasoning, if the utility fails to sustain the burden of proof by persuading the Commission to adopt its contractual position, the utility will be liable for some or all of the qualifying facilities' costs and fees.

Minn. Stat. §216B.164 Subd.5 (1988) does state that when a contractual dispute between a utility and a qualifying facility is before the Commission for determination, "...the burden of proof shall be on the utility." The statute clearly refers to a burden of proof on the utility to come forward with evidence supporting its proposed contractual terms. Nowhere in the statute or in the rule regarding attorneys' fees is it stated or implied that the burden of proof regarding evidence is extended to the awarding of attorneys' fees.

The Commission finds that the Counties did not achieve a sufficient degree of success on the escalation issue to be considered a prevailing party for purposes of awarding attorneys' fees. As in the on-call matter, the party which actually succeeded on the issue was the Department. The Commission is unpersuaded by the Counties' "burden of proof" argument that the Counties should be awarded attorneys' fees because the Company's position was not adopted. The Commission will not award attorneys' fees to the Counties on the escalation issue.

### **In-Service Date**

When a utility needs new base load capacity, its avoided capacity costs reflect the cost of its new planned base load capacity addition. The in-service date is an estimate of the date that the new base load facilities are expected to go into service. The monthly contract payments will depend upon how much of the contract period uses base load capacity in calculating avoided capacity costs, and the relative in-service dates of the qualifying facility and the utility's planned capacity addition.

When originally before the Commission for dispute resolution, the Company estimated that it would require additional base load capacity in 1998. The Counties argued that the Company would probably need additional base load capacity by 1989, and certainly by 1992. The Department recommended an in-service date of 1997. In its July 7, 1989 Order, the Commission adopted the Department's recommendation and ordered an in-service date of 1997.

In their petition for reconsideration and rehearing, the Counties applied the same reasoning to the in-service date issue as they had applied to the escalation rate issue. The Counties argued that they had achieved a portion of the result they had sought in bringing suit, and under Hensley they should recover a portion of their costs and attorneys' fees.

As in the escalation rate matter, the Commission finds that the Counties did not achieve a sufficient degree of success on this issue to be considered a prevailing party for the purpose of awarding attorneys' fees. Although complete success on an issue is not necessary to pass the threshold "prevailing party" test in Hensley, here the Counties could not be said to have **succeeded** at all. The Commission's final determination was not even close to the date proposed by the Counties. As in the escalation rate issue, the party which could be said to have succeeded was the Department, whose recommendation was adopted.

### **Referral of the Award of Attorneys' Fees and Costs to an Administrative Law Judge**

In their petition for reconsideration and rehearing, the Counties argued that the determination of

reasonable attorneys' fees and costs should be made by an administrative law judge. The Counties reasoned that an administrative law judge would be best able to administer the evidentiary process and to form a determination based on the evidence, because the ALJ could hear direct and cross-examination testimony.

In its reply to the Counties' petition, the Company argued that the Counties' request for appointment of an administrative law judge was premature and should be rejected. The Company requested that the Commission defer the matter of an ALJ until the Counties had submitted their itemized claim and NSP had an opportunity to comment.

The Commission finds that the Counties' request for determination by an administrative law judge is premature. The Commission can only decide if material facts are in dispute when it has had the opportunity to review the Counties' fee presentation plus any comments by NSP or others. At that time it will be appropriate for the Commission to determine if an administrative law judge should be appointed.

### **NSP's Request for Clarification of Order or Leave to Defer Responsive Comments**

In its March 16, 1990 filing, NSP requested the Commission to either:

1. Clarify that the Commission's January 26 Order intended that a response to the Counties' Fee Presentation is not required until twenty days after all petitions related to fees are resolved; or
2. Grant NSP leave to defer responsive comments to the Counties' Fee Presentation until twenty days after the Commission resolves the merits of the Counties' Petition for Reconsideration and Rehearing.

The Commission finds that NSP's request for deferral is reasonable, and will grant the request. The Company will be allowed up to twenty days after the issue date of this Order to file responsive comments to the Counties' Fee Presentation.

### **ORDER**

1. Dakota and Winona Counties' requests for full recovery of costs and attorneys' fees on the transmission loss adjustment and on-call requirement are denied.
2. Dakota and Winona Counties' requests for partial recovery of costs and attorneys' fees on the escalation rate and in-service date are denied.
3. The issue of referring the award of costs and attorneys' fees to an administrative law judge is deferred until the Commission has had an opportunity to review the Counties' fee presentation and any responsive comments.
4. Within twenty days of the date of this Order NSP shall file responsive comments to the Counties' fee presentation.
5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Lee Larson  
Acting Executive Secretary

(S E A L)